

GOH CHAT NGEE & ORS.

a

V.

TOH YAN & ANOR.

HIGH COURT MALAYA, MUAR

RICHARD TALALLA JC

[CIVIL SUIT NO. 146 OF 1981]

b

10 FEBRUARY 1991

TORT: *Negligence and nuisance - Common law obligation of adjoining land owner - Support of neighbour's land - Flooding of land - Mining operations - Duty of owner of land - Unlawful interference with use or enjoyment - Reasonable foreseeability - Mitigation of damages - National Land Code 1965, s. 44(1)(b) - Mining Enactment (No. 69), ss. 17(vii), 128.*

c

The plaintiffs were the owners of land held under Lots No. 2712 and 2713 (the said land) and the 1st defendant D1 was the holder of a Mining Certificate No. 1000 (the said certificate) for the purpose of carrying out mining operations on the land known as Lot No. 108 (the mining land) and the 2nd defendant, D2, carried out the said operations with the consent of D1 from April to August 1979.

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The plaintiffs allege that as a result of the mining operations which were carried out too close to the said land, the soil structure of the said land was disturbed and this resulted in loss of support of the said land which in turn led to the flooding, collapsing and sinking of the said land in April 1979. The plaintiffs allege that in carrying out the said mining operations, the defendants had been negligent, guilty of the torts of nuisance and non-natural use of their land resulting in escape of water onto the plaintiffs' land.

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The defendants denied liability, contending that the said land was higher than and sloping towards the mining land and that the plaintiffs failed to provide an effective drainage system which resulted in the portion of the said land adjoining the mining land becoming a waterlogged swamp, that due to excessive rainfall during the season, water collected in the swamp, burst a bund which had been erected by D1 and overflowed into the mining land and caused damage. D1 therefore counterclaimed for damages.

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Held:

[1] The common law obligation of an adjoining land owner to maintain support for his neighbour's land and not to do anything which adversely affects that support is embodied in s. 44(1)(b) of the National Land Code 1965 (NLC) and in ss. 17(vii) and 128 of the Johore Mining Enactment (No. 69).

g

[2] The Court believed the evidence of PW3, a rubber tapper who worked for the plaintiffs, who testified as to the collapse of the soil and the bund and how the said land became flooded and PW4's expert view as to how the incident occurred and the reasoning for it so happening.

[3] The defence led no or no sufficient evidence as to how the mine was worked at the material time and relative to the breaking of the bund - neither was any person concerned with the operation of the mine at the relevant time called to explain how and where on the mining land the mining operations were carried out.

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[4] DW1, the Deputy Director of Mines, did not testify as to officers of his department or himself inspecting the mine at any reasonable time before the incident occurred or at all; there was therefore no evidence adduced on behalf of the defence indicating how close to the bund the mining operations were conducted before the bund collapsed.

i

- a** [5] Bearing in mind the evidence that the mining operations came to an end on 25 August 1979, it is clear that mining operations were conducted so as to obtain as far as possible the last ounce of ore from the mining land and that in achieving this object, mining was carried out too close to the said land and the bund and that part of the said land beyond the bund collapsed and subsided, that water flowed from the parit flowed both into the mining land and the low-lying part of the said land and that this resulted in the parit becoming choked with mud and silt and preventing the free flow of water away from the said land and the mining land.
- b**

[6](a) D1, as the person who constructed the bund should have known its strength and should have taken precaution to ensure that the mining operations were carried out in such a manner as not to cause the bund to collapse or be affected in any way as to cause damage to the said land;

- c** (b) as the holder of a mining licence and having previous mining experience and knowledge of the area concerned, D1 should have known that the soil in that area was poor tensional quality and permeable - this was all the more reason for D1 to ensure that the mining operations were not carried out too close to the bund.

- d** [7] D1 is guilty of negligence and nuisance because of unlawful interference with the use or enjoyment of the said land. In the alternative making or causing to make use of the mining land in such a way as to interfere with the use or enjoyment by the plaintiffs of their lands, and that was something he might reasonably have foreseen - he was also guilty of breach of statutory duty under the said Enactment.

- e** [8] D1's contention that he was not liable as the mining operations were not conducted by him but by independent contractors was rejected as D1 had not complied with O. 19 r. 15 of the Rules of the High Court 1980 as he did not expressly plead that he was denying liability as a result of the act of a third party or the facts relating thereto.

- f** [9] D1 was the virtual owner of the mining land who owed the plaintiffs the duty to ensure that their right to the support of their land pursuant to s. 44(1)(b) of the NLC was not affected and D1 could not avoid that duty by getting some other person or persons to mine the land as arranged in the agreement.

- g** [10] D1 in all these years stood by and did nothing to mitigate the plaintiffs' loss as to date the bund remains broken and the land flooded; there was no offer of compensation and no payment into Court. The burden of proof was on the defence to show that the plaintiffs ought reasonably to have taken suggested mitigating steps and this burden was not discharged.

[Judgment for the plaintiffs; damages assessed.]

Cases referred to:

- Dalton v. Angus* [1881] 6 AC 740; 6 AC 829
- Davis v. Treharne* [1881] 6 AC 460
- h** *Hiap Lee (Cheong Leong and Sons) Brickmakers Ltd. v. Weng Lok Mining Company Ltd.* [1974] 2 MLJ 1
- Davie v. New Merton Board Mills Ltd.* [1956] All ER 379
- Cassidy v. Ministry of Health* [1951] 1 All ER 574
- Gold and others v. Essex County Council* [1942] 2 All ER 273
- Noor Azahar bin Habin v. Rajaswari a/p Sithampara Pillai & Anor.* [1991] 3 CLJ (Rep) 339

i

Legislation referred to:

Mining Enactment (Enactment No 69) (Johore), ss. 17(ii), 128
National Land Code 1965, s. 44(1)(b)
Rules of the High Court 1980, O. 19 r. 15

For the Plaintiffs - Seow Siew Mei; M/s. E. Ramasamy & Co.

For the Defendants - Rugber Singh; M/s. Rugber Singh & Partners

JUDGMENT

Richard Talalla JC:

The plaintiffs were the owners of land held under Lots No. 2712 and 2713 held under Certificates of Title No. 5289 and 5290 in the Mukim of Parit Jawa in the District of Muar (the plaintiffs' land). This fact was proved by PW1 the plaintiff Goh Chat Ngee (Goh) producing the said Certificates of Title and the 1st defendant Toh Yan (DW2) admitting whilst testifying that the plaintiffs' land belonged to PW1.

It was pleaded by the plaintiffs and admitted by the defendants in their respective pleadings that the 1st defendant was the holder of a Mining Certificate No. 1000 issued by the Commissioner of Lands and Mines Johor for the purpose of carrying out mining operations on the land known as Lot No. 108 in the Mukim abovementioned (the mining land) and that from or about April 1979 to about August that year the 2nd defendant was carrying out the said operations with the consent and permission of the 1st defendant.

The plaintiffs proceeded to trial only against the 1st defendant. The plaintiffs pleaded that in or about April 1979 part of the plaintiffs' land collapsed and sank, that this was caused *inter alia* by the said mining operations being carried out too close to the plaintiffs' land resulting in disturbance of soil structure and loss of support of the land and approximately 3 acres of the plaintiffs' land becoming flooded, with the damage continuing. The plaintiffs went on to plead in this regard that the defendants in carrying out the said mining operations were negligent, guilty of the torts of nuisance and non natural use of their land resulting in escape of water onto the plaintiffs' land. The 1st defendant denied all this.

Instead the 1st defendant pleaded that the plaintiffs' land was higher than and sloping towards the mining land, that the plaintiffs failed to provide an effective drainage system within the plaintiffs' land which resulted in the portion of the plaintiffs' land adjoining the mining land becoming a waterlogged swamp, that due to excessive rainfall during the season water collected in the swamp, burst a bund which had been erected by the 1st defendant and overflowed into the mining land and that thereby damage was caused to the mining operations in respect whereof the 1st defendant counterclaimed damages.

It was common ground that there was a parit running alongside the bund and that this parit was located between the bund and the plaintiffs' land. On 1 August 1989 I visited the scene accompanied by both Counsel, the first named plaintiff and the first defendant.

The plaintiffs called 6 witnesses to prove their claim. PW1 Goh testified that on 27 April 1979 his tapper Lau Ah Bah informed him of the flooding, that together they went to the scene where he, Goh, found that part of the bund had collapsed causing water to rush in and flooding to occur resulting in the soil collapsing and sinking. He testified that the water was rising, at about 1 inch per ten minutes. He had his legs in the water and could see it coming up higher on his legs. The plaintiffs' land was sloping and so constituted as to be like the segment of a basin. This witness testified that about half an acre of the lower portion of the plaintiffs' land was moist but not covered by water, that this portion being unsuitable

- a* was not planted but the rest of the land was planted with rubber trees and this was the situation when the plaintiffs bought the land in 1977. PW1 had inspected the plaintiffs' land when it was bought and found no water. He testified that if then there was water on the land, the portion affected would have been left out of the purchase. According to him the trees were 16 years old in 1979. This witness said that the water on the plaintiffs' land was rising, then after 4 or 5 years it subsided, that in the end about half an acre was under
- b* water, that water seeped into part of the plaintiffs' land around the water covered half acre and that finally more than 2 acres of the peripheral land became permanently affected and that as a result of the seepage, the roots of the rubber trees began to rot and the leaves turned yellow. This was about 3 or 4 months after the incident and after about 1 year some 540 trees died. He counted the dead trees with his tapper. He said that the land was worthless because the water still keeps seeping and the bund has not been filled up or repaired to
- c* date. Goh testified that there is less water now because they had been filling the sides of the pool of water with earth from the higher ground on their land. This witness testified that there was no excessive rain in April 1979 and that the parit was on the plaintiffs' land but that the bund was on the mining land and built by the defendants. He said that no matter how heavy the rain the water always went down to the parit.
- d* PW2 Lim Tian Wah was the next witness to testify on behalf of the plaintiffs. He was the registered owner of lot 2711 which adjoins and is to the right of the plaintiffs' land as one faces the mining land from a standpoint on the plaintiffs' land. This witness testified to a portion of his land also being moist, paya land, like the plaintiffs' land and becoming flooded along with the plaintiffs', only to a lesser extent, but that none of his trees died.
- e* PW3 Toh Lai Chuan gave evidence to the effect that he worked for PW2 as a rubber tapper on his said land. He identified the plaintiffs' land and his employer's land by reference to plans in the bundles of documents. He identified the paya area on the plaintiffs' land. He testified that in the 10 years he worked on that land, the land when raining would be very damp. If not raining the land would be alright - "don't feel wet on it", and there was never any land collapse. This witness identified the parit and its location and added that it was built by the land owner, which I took to mean the plaintiffs, that at the beginning the parit
- f* was small but that the mining company widened it when the mining operations started. He said that before commencement of the mining operations the mining land was uncultivated and full of undergrowth. It was the same level as the paya land. This witness said that on the morning of 27 April 1979 he went to tap the rubber trees. He testified that he saw the collapse of the soil and the bund with his own eyes when he was tapping rubber, that the parit filled with soil when the bund collapsed and water from the parit flowed onto the land.
- g* When this witness first saw the land there was a little bit of water. He informed his employer. He returned with the latter and found there was more water. The witness admitted that he was just a rubber tapper but testified to having worked as a mining worker previously. This witness said that the collapse of the bund was caused by the pump used by the miner to wash down the soil. He saw the miner using the pump every day, when he was tapping. PW3 testified to seeing the mining operations being carried out near the rubber estate. "They
- h* shoot to land near the rubber land", he said. He added that the force of the pump was too great, that as they kept on washing down the soil, the soil became loose and there was no strong support and slowly the collapse.
- i* I shall leave out the testimony of PW4 and PW5 at this juncture and proceed straight to PW6 Lau Ah Bah who was a rubber tapper employed by the plaintiffs to work on their said land. He was so employed immediately after the land was bought. This witness corroborated

the testimony of PW1 and PW3 in describing the land he worked on and its surroundings. He testified to seeing that the bund had collapsed on the day of the incident. When he saw it, it had already collapsed. He informed his employer straightaway. This witness too testified to it not having rained at that time or the day before. It was not the rainy season at that time, he said. He corroborated the evidence of the other witnesses in regard to the flooding of the plaintiffs' land. The water was up to the witnesses knees and the parit was full of water.

I now revert to the evidence of PW4 Mr. Liew King Fiang who testified to being a civil engineer having qualified as such in 1973. In 1982 he was practising as a Consultant Engineer. Mr. Liew's family were the owners of a tin mine similar to the one in question which he described as an alluvial open cast mine. He described how such a mine works. A water pump is used to inject and shoot direct to the vertical plan of excavated earth so that a mass of earth would collapse and be digested by the water pump and disintegrated by the water so that the mineral ore will be separated from soil and flow back along a drain to gravel pumps where the water, soil and mineral ore will be collected in a palong where the sand and tin can be segregated. The witness went on to say that this is a method widely used in Malaysia and that this method was used in his family mine. Mr. Liew visited the mine in question on 6 January 1983. By that time the mine had been abandoned and flooded with water so that ordinarily he would not have been able to observe the actual location of any mining pits and there is no evidence of his having located the same. However Mr. Liew did examine the quality of soil in the area and discovered it to be silt clay which he described as being unfavourable material in excavation. He found the silt clay where the bund divides Lot 2712 from the mining pool. This witness testified to the top soil of mining land having to be excavated and then the tin rich land underneath being cut by vertical plan. He said that land sliding would gradually occur and the mass of soil would deform and collapse particularly in the presence of water content. He spoke of "tensional failure" which he described to mean that when soil is under water, the presence of the water causes the soil to disintegrate and erosion of soil then takes place. Mr. Liew testified that tensional failure would occur particularly near the face of the earth cutting, that a slip circle would form and this would cause soil to collapse. In relation to this method of mining the witness spoke of safety requirements having to be met, the soil being silty clay soil. He said that the requirements could have been met by providing sloped cutting and avoiding vertical cutting. I put 2 specific questions to Mr. Liew which he answered. They are as follows:

Q: What caused the flooding of the rubber land in this case?

A: I think water, either from the ground water or water from natural drains. This is the external factor.

Q: What caused the broken bund?

A: Carelessness in cutting or cutting too near to the bund.

This witness went on to say that ordinary soil erosion would not have caused such a deep landslide. The witness testified that mining was done too close to the boundary and that as a result landsliding occurred. Mr. Liew said that a mining field becomes waterlogged when it is abandoned and that in the event of the field filling with water the bund would be useful to stop water from flowing into neighbouring land.

Apart from evidence relevant to the issue of damages, that was the plaintiffs' case.

- a** Three witnesses were called for the defence. DW1 Abdullah Zawawi was the Deputy Director of Mines of Jabatan Galian Malaysia, holding a Bachelor of Science degree in mining engineering. This witness confirmed that the mining done on this land was by the gravel pump method. According to this witness before a licence is issued a scheme plan prepared by a qualified consulting engineer would have to be approved by the Director of Mines. He then produced in evidence the approved plan and the licence in respect of the mine in question.
- b** He corroborated the testimony of PW4 as to how the mine operated. This witness then went on to testify that from his record, on 27 April 1979 there was a minor landslide which caused disturbance to the perimeter bund and to the stream running behind the bund. He added that it could have affected the surface of Lots 2712 and 2713. He went on to say that on breach of the bund the water from the stream would have flown into the mine hole. According to this witness, after the bund was repaired mining restarted. He said that the mining hole edge was 120 feet from the boundary, that the miner had a right to mine right up to the boundary but that it was the practice of the department to limit the distance depending on depth and nature of the ground. The common denominator, so this witness testified, that they normally used was half the depth but this was not strictly followed. The witness testified that the licence in this case limited the distance to one chain and that the mine had complied with the conditions of the licence. The witness confirmed that in 1979 he was the Inspector of Mines Johor, that his duty was to ensure that mining operations were carried out in accordance with the conditions of the licence and to ensure that the environment was protected namely that water from the tailing area did not pollute the neighbouring streams and rivers and that discoloured water caused by churning did not flow likewise, especially in respect of rivers and streams used by the kampung people. This witness did not keep a daily record of the safety gradient of the mine. He said that during their inspection they would be able to know if the safety gradient was not carried out. The gradient was to protect safety operations. Conditions 3 and 13 of the mining licence read as follows:
- c**
3. That no injury be done to State or other land or river.
13. That no mining, dumping or interference of any sort shall be carried out within one chain from the banks of any unnamed stream.
- d**
- e**
- f** En. Abdullah Zawawi testified that these conditions were to protect neighbouring land. He said that if the neighbouring land was mining land then mining could proceed to the boundary. The witness considered the landslide on 27 April 1979 to be a minor one because, so he testified, no damage was done. According to him it would be serious only if there was a fatal accident or serious injury and that in this case there was no such thing. En. Abdullah's assistant visited the mine 2 days after the landslide. It was a routine visit. No report had been made about this incident. However the assistant came back and reported to En. Abdullah and the latter directed that the bund be repaired. After that the assistant visited regularly. According to En. Abdullah on 24 June 1979 his assistant visited the mine and discovered that the mine had started working. This witness testified that mining operation stopped on 15 August 1979 when it ceased to have value and that is the position up to today. He last visited the site on 2 August 1979. This witness said that when the landslide occurred he did not know the gradient. He added that everyone knew that the land was permeable. He said that the mining lease was from 7 October 1974. It was for 10 years and expired in 1984. This witness said that the mining hole was dry when the bund breached, that there was no question of the water flowing onto Lots 2712 or 2713 at that time and that he did not see any surface damage to the land.
- g**
- h**
- i**

The first defendant Toh Yan gave evidence. He said he was 60 years old and a miner by occupation and that he was born in the area. He looked for mining land and carried out mining work since 1967. He said he was the owner of Mining Certificate 1000 (the Mining Certificate) and claimed to have started mining operations in 1974 which is the year he said he had obtained the mining certificate. No mining certificate was produced in evidence. He then contradicted himself by saying that he started mining operations in 1977 and that at that time he had a licence, that he employed a pump mining method, that he only received the licence to pump hydraulically in 1979. He then said the licence was to the 2nd defendant and not to him. He testified that he mined the land to the extent of about 8 acres. He stopped mining in 1979 when he handed the mine to the 2nd defendant to operate, pursuant to the terms of an agreement (the agreement) entered into on 30 November 1978. The agreement was between the 1st defendant as the holder of the mining certificate and two persons (the miners) trading as Encore Enterprise, whereunder for a 15% tribute the 1st defendant granted the said two persons the right and liberty to mine the land.

*a**b**c*

The agreement provided for the miners to work the mining land in a skilful and workmanlike manner at their own cost, providing labour and equipment, to mine the land in accordance with the mining laws and to indemnify the 1st defendant against loss arising from default of the miners and that the 1st defendant was entitled to be present whenever the palong was cleared and the tin ore dressed for sale. Earth and the like deposited in or around the mining land resulting from the mining was to belong to the 1st defendant but there was a provision for the miners to use part of it for the erection of bunds and dam. The miners were to have possession of the mining land but not to part with it. Failing compliance with the terms of the agreement and in certain other events the 1st defendant had the right to terminate the agreement and have repossession of the mining land and so long as the miners complied with the terms of the agreement they were free to mine the land until it became fully exhausted of tin ore. He testified that when he was operating the mine he did phosphate boring.

*d**e*

The 1st defendant testified that he knew the plaintiffs' land, that it adjoined the mining land and that about half an acre of the plaintiffs' land was paya land. He claimed that no rubber was planted there and that it was covered with jungle and water. He described the mining land as being 100 acres in area and it was swampy and bushy before mining became operational.

f

In evidence the 1st defendant said that in 1978 he handed over the mining work to Encore. The 1st defendant testified that before the flooding he had personally seen the plaintiffs' land. He visited the mine twice a month and on each occasion he observed the plaintiffs' land. The 1st defendant testified that the plaintiffs' land, 5 acres of it, was under water and that he did not see any useful trees, like rubber, on that land. He claimed that it was covered with bushes. He said that after the flood he also saw the plaintiffs' land and observed it to be under water. He swore that the land was similar to what it was before the flood that is to say that that part of the plaintiffs' land that was covered with water was the same as after the flood. He went on to testify that before the flood the water level on the plaintiffs' land was 6 to 8 feet and that after the flood the water level was slightly higher and that this was due to the collapsed land. At the same time this witness confessed that the mining land was the same level as the paya land before the mining operations commenced. In fact he testified that the plaintiffs' land was slightly higher than the mine. The witness looked at Exhibit D.3, photograph 14 and said that before the flood the condition of the land was more or less as shown in that photograph and that from the photograph he did not see any useful trees on the land, it being covered with jungle.

*g**h**i*

- a* The 1st defendant testified further that Encore built the bund. He then said that he built the bund and handed it to Encore later. This witness said that he used an excavator to build the bund. He used soil from the area to build the same. He built it 5 feet wide and along the land. He dug up the land for the bund. He went on to say that the bund was about 6 feet high from ground level. This witness said that tin ore was 10 feet under the ground and that he had experience in mining. He testified that there had to be a safe distance between one mining hole and another mining hole, that the gap should be about 60 feet from one mining hole to another, that the distance was to prevent water rushing in from a disused hole, that water would fill from underground and that if a mining hole was left unattended water from the ground would collect from the mining hole and make the water level the same as the height of the ground level.
- b*

- c* The 1st defendant testified that in 1979 he was informed by Encore that the mine had been covered with water, that he went to see the mine 2 days later and noticed that the plaintiffs' land had collapsed, that water had collected in the mine, that the mine and machinery were under water and that Encore had stopped work.

- He claimed that the water runs into the lombong. He said that the bund was there to prevent that happening but that the bund collapsed whereafter the water in the mine rose to a height of the level of the land. It took 2 days for the water level to rise. He said in evidence that Encore repaired the bund but he did not see the repairs being done.
- d*

- The third and last witness for the defence was En. Zakaria bin Saat, the District Surveyor, Muar, and the holder of a degree in land surveying from University Technology Malaysia. He brought along with him the survey plans and field log book relating to Lots 2712 and 2713. By reference to the dotted lines shown on the documents of title to these Lots and Lot 2711 he said that they indicated the border line of a swamp (paya) and the ordinary land. He was asked what paya land meant. In answer he testified that tanah paya is low land area, that the land surface was soft and sometimes water logged. His description of the land was, he said, to his knowledge and as a result of his experience. However he had not visited the paya land. He testified that there was no drain or parit indicated on his plan and that in 1964 there was also no drain indicated in the plan. He testified that according to the plan the mining land was the same level as the paya land. He said there was a variation in the area of the paya land depending on the weather, that during the hot season the water evaporated and therefore the wet area was less than when it rained when the area became larger. This witness said that the paya on Lot 2712 was approximately 1.28 acres and on Lot 2713 0.15 acres, but that that was only an estimate. In this regard he was asked by Counsel for the defence to calculate the area before coming to Court. He confessed to the Pengarah who certified the copy not having given the area. The plans he brought with him were made in 1964 and the field book in respect of Lots 2711, 2712 and 2713 was endorsed with the remarks "cleared" and "young rubber".
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- g*

- I accepted the witnesses called on behalf of the plaintiffs as witnesses of truth. I especially found PW3 to be an independent witness and accepted his testimony as to what he saw and how the plaintiffs' land came to be flooded. I also accepted PW4 as an independent witness together with his expert view as to how the incident occurred and the reason for it so happening. Certainly on their pleadings the plaintiffs had made out a *prima facie* case against the 1st defendant giving rise to a right to an award of damages.
- h*

- The 1st defendant on the other hand, in my view, failed to establish a successful defence to the plaintiffs' claim nor to prove his counterclaim, as pleaded or at all.
- i*

There has always been an obligation at common law for an adjoining land owner to maintain support for his neighbours' land and to do nothing adversely to affect that support. See the old case of *Dalton v. Angus* [1881] 6 AC 740. See also the case of *Davis v. Treharne* [1881] 6 AC 460. That obligation is now embodied in s. 44(1)(b) of the National Land Code, which reads as follows:

(1) Subject to the provisions of this Act and of any other written law for the time being in force, any person or body to whom (under this Act or a previous land law) land has been alienated, reserved land has been leased or temporary occupation licence (including a licence so styled under a previous land law) has been granted in respect of any land, shall be entitled to:

(b) the right to the support of the land in its natural state by any adjacent land, and all other natural rights subsisting in respect thereof.

By reference to The Laws of The State of Johor and the Mining Enactment (Enactment No. 69) it is provided in ss. 17(vii) and 128 as follows:

17. There shall be implied in every lease, not expressed to be for working mineral-oil, in the absence of any express provision to the contrary, the following obligations on the part of the lessee, and such other obligations, if any, as may be expressly set forth therein:

(vii) that the lessee will not use, or permit to be used, any portion of the land for any purposes other than those mentioned in s. 15, without the written authority of the Commissioner.

128. No title, licence or other authority issued under the provisions of this Enactment shall exempt any person from liability in respect of any damage occasioned by such person to the property of the government or of any person.

In particular, and by reference to the pleaded defence, the 1st defendant failed to prove that the plaintiffs did not provide an effective water-way or drainage system within their land thus causing a portion of their land to become a water logged swamp and due to excessive rainfall water collected thereon, burst the bund and overflowed into the mining land.

There was not one whit of evidence of heavy or unusual rainfall at any time.

The defence led no or no sufficient evidence as to how the mine was worked at the material time and relative to the breaking of the bund. Not one person concerned with the operation of the mine at the relevant time was called to explain how and where on the mining land the mining operations were carried out.

It is true that the defence called as a witness the Deputy Director of Mines who was at the time of the incident in question the Inspector of Mines Johor and that this witness said that the mining hole was 120 feet from the boundary. But this witness also said that the miner had a right to mine right up to the boundary but that it was the practice of the department to limit the distance depending on the depth and nature of the ground. He referred to a common denominator as abovementioned which was not strictly followed and to a limited distance of 1 chain. This witness did not testify to officers of his department or he himself inspecting the mine at any reasonable time before the incident occurred or at all. Thus there was no evidence adduced on behalf of the defence indicating how close to the bund the mining operations were conducted before the bund collapsed.

Having considered the evidence as a whole I find, on a balance of probabilities, that the mining operations were conducted so as to obtain as far as possible the last ounce, so to speak, of ore from the mining land. I find this to be a reasonable inference bearing in mind the evidence of the 1st defendant and the Director of Mines that mining operation came to

- a** an end on 25 August 1979. I find that in achieving this object mining was carried out too close to the plaintiffs' land and the bund and part of the plaintiffs' land beyond the bund collapsed and subsided, that water from the parit flowed both into the mining land and the low-lying part of the plaintiffs' land, that as a result of all this the parit became choked with mud and silt and prevented the free flow of water along the natural course of the parit away from both the plaintiffs' land and the mining land. In this regard it should be said that when
- b** I visited the land the parit was found to be very slow moving, almost stagnant.

I accept that the parit was on the plaintiffs' land and was ordinarily sufficient to drain any water that naturally came from the paya land, a *fortiori* since the defendant or his representatives had widened the parit for the purposes of the mining operation.

- c** The 1st defendant as the person who constructed the bund should have known its strength and should have taken precaution to ensure that the mining operations were carried out in such a manner as not to cause the bund to collapse or be affected in any way as to cause damage to the plaintiffs' land.

- d** As the holder of a mining licence and having himself admitted that he had previous mining experience and knowledge of the area concerned, the 1st defendant should have known that the soil in that area was of poor tensional quality and permeable. In fact the Director of Mines testified that everyone knew that the land was permeable. That was all the more reason for the 1st defendant to ensure that the mining operations were not carried out too close to the bund. The view I take is that the 1st defendant, bearing in mind the experience he had could and should have reasonably foreseen that in carrying out the mining operations I have found they were carried out, the bund would collapse along with all the consequent damage.

- e** Accordingly I find the 1st defendant to be liable to the plaintiffs in negligence. I also find him guilty of nuisance that is to say of an unlawful interference with the use or enjoyment of the plaintiffs' land; in the alternative making or causing to make use of the mining land in such a way as to interfere with the use or enjoyment by the plaintiffs of their lands, and that was something which he might reasonably have foreseen. In this regard see *Hiap Lee (Cheong Leong And Sons) Brickmakers Ltd. v. Weng Lok Mining Company Ltd.* [1974] 2 MLJ 1 at p. 4. I also find him to be in breach of his statutory duty under the said Mining
- f** Enactment.

The 1st defendant sought to escape liability by saying that the mining operations were not conducted by himself but by independent contractors, relying on the agreement abovestated.

- g** Inasmuch as he was doing so he should have expressly pleaded so. Order 19 r. 15 of the Rules of the High Court requires a defendant to raise by his pleadings all such grounds of defence or reply as if not raised would be likely to take the opposite party by surprise. Inasmuch as the 1st defendant was denying liability to the plaintiff relying on the act of the 3rd party, he should have pleaded all the facts relating thereto. See the case of *Davie v. New Merton Board Mills Ltd.* [1956] All ER 379. At the eleventh hour, so to speak, Counsel applied to amend the defence. I was not minded to grant the application, especially since in
- h** any event I did not consider that the 1st defendant was able in this way to escape liability to the plaintiffs for damage in negligence and for nuisance.

The view I take based on all the evidence in this case is that it was the first defendant as the virtual owner of the mining land who owed to the plaintiffs the duty to ensure that their right to the support of their land pursuant to s. 44(1)(b) of the Code abovestated was not

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affected and the 1st defendant could not avoid that duty by getting some other person or persons to mine the land as he arranged to in the agreement abovestated. In *Gold and others v. Essex County Council* [1942] 2 All ER 273 at p. 242 Lord Greene MR said:

but in each case the first task is to discover the extent of the obligation assumed by the person whom it is sought to make liable. Once this is discovered, it follows of necessity that the person accused of a breach of the obligation cannot escape liability because he has employed another person, whether a servant or agent, to discharge it on his behalf.

In *Cassidy v. Ministry of Health* [1951] 1 All ER 574 which was a case in which the plaintiff a patient was suing the Ministry of Health for injuries he suffered as a result of the negligence of surgeons employed by the hospital authority under contract of service, the *dictum* abovestated of Greene MR was referred to, and Denning LJ, as he then was said:

In my opinion, authorities who run a hospital, be they local authorities, government boards, or any other corporation, are in law under the self-same duty as the humblest doctor. Whenever they accept a patient for treatment, they must use reasonable care and skill to cure him of his ailment. The hospital authorities cannot, of course, do it by themselves. They have no ears to listen through the stethoscope, and no hands to hold the knife. They must do it by the staff which they employ, and, if their staff are negligent in giving the treatment, they are just as liable for that negligence as is anyone else who employs others to do his duties for him. What possible difference in law, I ask, can there be between hospital authorities who accept a patient for treatment and railway or shipping authorities who accept a passenger for carriage? None whatever. Once they undertake the task, they come under a duty to use care in the doing of it, and that is so whether they do it for reward or not. It is no answer for them to say that their staff are professional men and women who do not tolerate any interference by their lay masters in the way they do their work. The doctor who treats a patient in the Walton Hospital can say, equally with the ship's captain who sails his ship from Liverpool and with the crane driver who works his crane in the docks: "I take no orders from anybody." That "sturdy answer," as Lord Simonds described it in *Mersey Docks & Harbour Board v. Coggins & Griffith (Liverpool), Ltd.* (12) ([1946] 2 All ER 363), only means in each case that he is a skilled man who knows his work and will carry it out in his own way. It does not mean that the authorities who employ him are not liable for his negligence. The reason why the employers are liable in such cases is not because they can control the way in which the work is done - they often have not sufficient knowledge to do so - but because they employ the staff and have chosen them for the task and have in their hands the ultimate sanction for good conduct - the power of dismissal.

The learned Judge went on to say at pp. 586 and 587 of that case as follows:

I take it to be clear law, as well as good sense, that, where a person is himself under a duty to use care, he cannot get rid of his responsibility by delegating the performance of it to someone else, no matter whether the delegation be to a servant under a contract of service or to an independent contractor under a contract for services. Lord Blackburn laid that down on many occasions: see *Tarry v. Ashton* (1 QBD 319); *Dalton v. Angus* (6 AC 829) and *Hughes v. Percival* (8 AC 446); and so have other great Judges.

As to the issue of damages, again I accepted the evidence led by the plaintiffs. I accepted PW1 as an honest and reasonable witness in his estimation of the damage the plaintiffs suffered. For example it was known to him that Government estimated the value of a rubber tree at RM25. PW5 En. Tan Chye Ann an officer of Rubber Industry Smallholder Development Authority (RISDA) and the holder of a Bachelor's degree in Science from Universiti Pertanian Malaysia and a diploma in agriculture from the same establishment gave evidence for the plaintiff. This witness said that if government acquired rubber land it would pay 25% compensation per tree and that this was so in 1981. This he said was the standard price

- a** paid for a rubber tree no matter what the age of the tree was. He testified that in the course of his work he had come across documents showing that government had compensated by paying RM25 per tree. He had seen these documents in applications of smallholders submitted to his office for approval of replanting grant. By way of example he said that when the Lembaga Letrik Negara (LLN) require land for erecting a transmission line they will compensate smallholders at the rate of RM25 per tree felled.
- b** Yet PW1 claimed only RM20 per tree. When asked why he claimed that sum, his answer was that he did not dare to claim so much. On the other hand the defence did not lead any or any effective evidence on the issue of damages but simply sought in cross-examination to break down the plaintiffs' case on the issue, which I considered they failed to do. I find that before the incident, half acre of the plaintiffs' land was paya and non income producing. This half acre was accordingly disregarded in assessing damages. I find however that 2 1/2
- c** acres of the plaintiffs' land was wholly affected by the flooding. No doubt the water rose, then subsided, but there was seepage rendering these 2 1/2 acres useless. I find the value of the land was RM15,000 per acre and the plaintiffs loss of value of the 2 1/2 acres to be RM37,500.
- d** In addition the plaintiffs are entitled to be compensated for the net loss of profit from the 2 1/2 acres of land rendered useless by the flooding. I assess the average gross profit per acre at RM235 per month and the net loss after deducting the cost of labour to be RM117.50 per month per acre, amounting to RM293.75 per month for 2 1/2 acres.
- As far as possible the plaintiffs should be restored to the same financial position they would have been in if the flooding did not occur. In respect of the 2 1/2 acres every month they would have had in their hands a sum of RM293.75. Naturally this sum would have been
- e** compounded every month. Therefore it seems to me that the 1st defendant should ordinarily have to pay interest on the sum of RM293.75 compounded every month. The plaintiffs' rubber trees were about 15 years old when the flooding occurred. DW3 testified and produced field books showing that the trees were planted in 1964. I accept the evidence that rubber trees are productive for about 30 years. It follows that interest should be payable from 27 April 1979 to the date of judgment.
- f** As to the rate of such interest, ideally the plaintiffs' case should have been heard and judgment given as soon as possible after the incident in which event the statutory rate of 8% payable in respect of judgment sums would have applied. It is not the fault of the plaintiffs that this case was determined more than ten years later.
- g** The defendant in all these years stood by and did nothing to mitigate the plaintiffs' loss. The bund to date remains broken and the plaintiffs land flooded. There was no offer to make good the damage, no offer of compensation and no payment into Court.
- The plaintiffs tried to mitigate their loss by planting durian trees on their land but were unsuccessful. The durian trees planted on the affected 2 1/2 acres would not produce because of the seepage. Again in all the ten years and more that have elapsed the 1st defendant
- h** offered no suggestion as to how the plaintiffs could have reduced their loss. The burden of proof was on the defence to show that the plaintiffs ought reasonably to have taken suggested mitigating steps. See *Noor Azahar bin Habin v. Rajaswari a/p Sithampara Pillai & Anor.* [1991] 3 CLJ (Rep) 339. The 1st defendant failed to do so.
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Accordingly I adjudge that:

(a) the 1st defendant do pay the plaintiffs:

(i) damages of RM37,500 with simple interest thereon at the rate of 8% per annum for the period 27 April 1979 to date of judgment.

(ii) damages being net loss of profits in the sum of RM293.75 per month with interest thereon at the rate aforesaid from the last day of the month when such monthly income shall have accrued to date of judgment.

(iii) costs of the action to be taxed on the scale of costs applicable to the High Court.

(b) the defendant's counterclaim be and is hereby dismissed with costs to be likewise taxed.

Also found at [1991] 2 CLJ 1163

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